Supreme Court of the United States

October Term, 1977

No. 77-76

FRED H. SMITH and DOROTHY A. SMITH,
Petitioners,

vs.

VILLAGE OF LaGRANGE,
A Municipal Corporation Under the Laws of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Ashland County, Ohio, Court of Appeals
For the Fifth Appellate District

JOHN R. JAMES
55 Shiawassee Avenue
Akron, Ohio 44313
Phone No. (216) 867-6161
Attorney for Petitioner

ROBERT J. CORTS
517 Broad Street
Elyria, Ohio 44035
Phone No. (216) 322-6229
Attorney for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes and Rules

Texts

Other

Supreme Court of the United States

October Term, 1977

No. _____

FRED H. SMITH and DOROTHY A. SMITH,
Petitioners,

vs.

VILLAGE OF LaGRANGE,
A Municipal Corporation Under the Laws of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Ashland County, Ohio, Court of Appeals
For the Fifth Appellate District

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioners, Fred H. Smith and Dorothy A. Smith, pray that a writ of certiorari issue to the Ashland County, Ohio, Court of Appeals for the Fifth Appellate District to review the judgment rendered in Case No. CA 652 entered in the above entitled action on February 7, 1977, and to which an appeal of right on constitutional questions was denied by the Supreme Court of Ohio in case No. 77-327 on May 12, 1977 upon the grounds that no substantial constitutional questions existed.

OPINION BELOW

The opinion of the Court of Common Pleas, Ashland County, Ohio, docketed as Case No. 31073, from which the appeal to the Fifth Appellate District followed is reprinted in the appendix, *infra*, A1, and the opinion of the Court of Appeals, Fifth Appellate District, Ashland County, Ohio, is reprinted in the appendix at A8. The denial of appeal to the Supreme Court of Ohio is printed at A10.

STATEMENT OF JURISDICTION

The judgment of the Ashland County Court of Common Pleas was entered on Oct. 20, 1976. The judgment of the Court of Appeals of Ashland County, Ohio, was entered on Feb. 7, 1977 to which an appeal of right on constitutional questions was taken to the Supreme Court of Ohio, which appeal was dismissed upon the grounds of no substantial constitutional question involved on May 12, 1977. This petition is, therefore, timely.

This Court's jurisdiction is evoked under 28 U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED

I.

Whether it is a denial of constitutional guarantees of due process and equal protection of law, as well as freedom to and protection of property, under the Fifth and Fourteenth Amendments to the United States Constitution, when statutory mandates have not been followed in eminent domain proceedings.

II.

Whether it is a denial of Fifth and Fourteenth Amendment guarantees of due process and equal protection of law when a court of limited jurisdiction hears and decides an eminent domain proceeding without determining its subject matter jurisdiction to proceed under statutory mandates of State Law.

III.

Whether it is a denial of United States guarantees of equal protection and due process of law under the Fifth Amendment and Fourteenth Amendment when an action is dismissed upon a finding of *res judicata* without a judicial finding of the facts which could justify a taking of property under the forms of law alleged to be unlawfully applied.

IV.

Did the Ashland County, Ohio, Court of Common Pleas, correctly rely on and interpret the case of *Emery v. Toledo* (1929), 121 Ohio St. 257, upon which the Fifth Appellate District of Ohio Appeals Court sustained the opinion?

V.

Was it a denial of due process and equal protection of law pursuant to the Fifth and Fourteenth Amendments to the United States Constitution to dismiss the action upon a finding of *res judicata* without a judicial determination that private property was taken for private use?

VI.

Was it a denial of due process and equal protection of law under the Fourteenth Amendment to the United

States Constitution to dismiss paragraph 16 of the plaintiffs' complaint for failure to state a claim without permitting plaintiffs to amend their complaint?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution, Clause 3, ". . . nor be deprived of . . . property without due process of law; . . ."

Amendment XIV, United States Constitution, Sec. 1, Clauses 3 and 4, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The V and XIV Amendments are reproduced at A10, A11.

STATUTORY PROVISIONS IN QUESTION

Those portions of Ohio Revised Code involved in this decision as in effect at the time of taking of the property in 1955, are Sections 121.22, 719.04, 719.05, 719.21, 731.10, 731.17 and 2309.04. These provisions of Ohio Revised Code are reproduced at pages A13-A16.

CIVIL RULES IN QUESTION

Those portions of Ohio Civil Rules involved in this decision are CR 8(E)(1), 12(B)(1), 12(B)(6), and 18. Their counterpart rules under the Federal Rules of Civil Procedure are 8(e)(1), 12(b)(1), 12(b)(6), and 18. These provisions of both the Ohio Rules of Civil Procedure and the Federal Rules of Civil Procedure are set out at appendix, A16-A18 and A18-A20.

STATEMENT OF THE CASE

On November 13, 1975, Plaintiffs-Appellants, Fred H. Smith and Dorothy A. Smith, proceeded in collateral attack against the Village of LaGrange, A Municipal Corporation Under the Laws of Ohio, in the Lorain County Court of Common Pleas to declare null and void an appropriation proceedings of their land begun July 30, 1955 and judgment on the verdict of the jury journalized by the Court on Dec. 14, 1955 and subsequent modification of the verdict by judgment entry on April 24, 1956. The Appellants ask for damages, ejectment, and trespass against the Village together with an accounting for the value of water removed from the premises and use of the land, and that the servants of the defendant be enjoined from harassing, intimidating and annoying plaintiffs in the free use and access to their property. Appellants have refused payment for the property.

The Complaint states:

1. That on July 30, 1955 the defendant Village passed Resolution No. 89 declaring an intent to appropriate property of plaintiffs for a water works and water supply in contravention of Ohio Revised Code Sec. 121.22 which rendered said Resolution void.
2. That plaintiffs were never given notice of such Resolution in violation of Sec. 719.05 ORC.
3. That Resolution No. 89, a copy of which is attached to the Complaint, was signed by Acting Mayor Harry Grabenstetter, when Acting Mayor

Grabenstetter had no authority to act under Sec. 731.10 ORC, rendering Resolution No. 89 void.

4. That on July 7, 1955, defendants Council passed Ord. No. 188 to provide for the issue and sale of $156,000.00 of revenue bonds to extend and improve the Municipal Water Works System of the Village in violation of Sec. 121.22 ORC, which rendered Ord. No. 188 void.

5. That at the July 7, 1955 meeting of the Council of defendant Village, Ord. No. 189 was enacted to provide for fixing rates and charges for water services in violation of Sec. 121.22 ORC, rendering Ord. No. 189 void.

6. That on July 7, 1955 at the Village of LaGrange Council Meeting Resolution No. 88 declaring purpose and necessity of plans for improved and restructuring water supply and treatment facilities through services of a registered professional engineer and surveyor was passed in violation of Sec. 121.22 ORC, rendering said Resolution No. 88 void. Plaintiffs further say that Resolution No. 88 was in violation of Sec. 731.17 ORC, in that three-fourths of the members of the legislative body did not vote to suspend the requirement that each resolution or ordinance be fully and distinctly read on three different days, rendering said Resolution void.

7. That on August 2, 1955, the Council of the Village of LaGrange, Ohio, passed Ordinance 190, a copy of which is attached to the Complaint and made a part thereof, Entitled "An Ordinance to Appropriate Private Property for a Supply of Municipal Water Works and Declaring an Emergency",

which Ordinance No. 190 was passed in contravention of Sec. 719.05 ORC and was therefore void.

8. That pursuant to void Resolution No. 89 and void Ordinance No. 190, defendant proceeded by petition to the Court of Common Pleas of Lorain County, Ohio, to ask the Court to cause a jury to be impaneled to make inquiry into and assess the compensation to be paid by the defendant to the property owners and to award said property to defendant according to law.

9. That pursuant to the processes of the Court, a jury was impaneled and sworn and the finding was made by the jury that the value to the owners for land taken was $12,000.00 and as damages to the residue of the tract the sum of $5,000.00, which verdict was journalized in Vol. 141, p. 596, Sept. Term of Court, 1955, and further ordering that upon payment by the Village of LaGrange to the owners the Village of LaGrange, Ohio, shall be entitled to possession of said property.

10. That subsequent to the above journal entry, numerous motions and appeals were filed, and on April 24, 1956, pursuant to journal entry Vol. 142, p. 556, the judgment was modified to reduce part of the premises taken in the original appropriation action by some 15.63 acres, and to reduce the amount of compensation the Village must pay to plaintiffs to a sum of $14,000.00 which agreement was recorded April 26, 1956 in Vol. 661, p. 109, and incorporated by journal entry filed April 24, 1956 in Vol. 661, p. 112 of the Recorder's Office of Lorain County, Ohio.

11. That prior to the journalized entry and recording of the Agreement between the parties and the

modified journal entry of judgment subject thereto, dated April 24, 1956, the Village of LaGrange, Ohio, on April 17, 1956, passed Ordinance No. 198 authorizing the solicitor to settle and compromise the litigation pending between plaintiffs and defendant which Ordinance was passed in violation of Sec. 121.22 ORC, and is void.

12. That Ordinance 199 authorizing the Clerk of the Village to pay for property appropriated was passed on May 1, 1956, to pay for the above appropriation of land of plaintiffs by defendant in violation of Sec. 719.21 ORC, which rendered the entire appropriation void.

13. That due to the void Resolution No. 89, and void Ordinance No. 190, of the Village of LaGrange, Ohio, the Court of Common Pleas of Lorain County, Ohio, was without jurisdiction to proceed in the appropriation proceeding; to subsequently modify by journal entry incorporating an agreement between the parties founded upon such void appropriation; to permit an agreement to become part of the record which was unlawfully authorized under Ordinance No. 198 of the Village; and to conduct any proceedings of fixing compensation for an appropriation in any manner whatsoever outside of the provisions of Ohio Revised Code 719 dealing with the appropriation of land.

14. That plaintiffs have been deprived of property without due process of law, and that their private property has been taken for public use without just compensation in violation of the Fifth Amendment of the Constitution of the United States; that they have been deprived of property without due process of law in contravention of the Four-

teenth Amendment of the United States Constitution; that the inviolability of their private property has been infringed pursuant to Art. I, Sec. 19 of the Constitution of the State of Ohio; and that their right to freedom and protection of property has been infringed pursuant to Art. I, Sec. 1 of the Constitution of the State of Ohio.

15. That more property than was reasonably necessary for a water works project and a supply of water was appropriated in the above matter, and that the Village of LaGrange, Ohio, appropriated private property for private use in granting permission in their regular meeting of June 5, 1956, to the LaGrange Hunting and Fishing Club to use the Village Quarry property for hunting and fishing purposes.

16. That the use of the LaGrange Quarry for a supply for water purposes for the inhabitants of the Village of LaGrange, Ohio, is no longer a sufficient use in quality or quantity for the growing needs of the Village and they have access to better supply from the Rural Lorain County Water Authority.

To these allegations of plaintiffs-appellants' Complaint, defendant, Village of LaGrange, filed its Motion, moving the Court for an order dismissing the Complaint of the plaintiffs for the reasons that (1) the court lacks jurisdiction to hear the matters contained in paragraphs 1-15 because these are matters which have been the subject of litigation in case No. 59190 in this court, which was appealed to and ruled upon by the District Court of Appeals of the Ninth Judicial District, and which was further appealed to and ruled upon by the Supreme Court, and that all the issues raised in paragraphs 1-15 were or could have

been litigated in that case; and further for the reason that (2) the matter contained in paragraph 16 of the plaintiffs' Complaint does not state a claim upon which relief can be granted.

Briefs in opposition to defendant's Motion and in support thereof were filed by both parties and subsequent thereto appellants filed a Motion for Change of Venue with the Common Pleas Court of Lorain County, which Change of Venue was granted in Case No. 80044-75 and transfer was made to the Court of Common Pleas, Ashland County, Ohio, in Case No. 31073.

On June 4, 1976, the Ashland County Court of Common Pleas heard arguments in support of and against defendant Village's Motion and rendered an opinion in which the Court stated that the Motion of the defendant Village was well taken relying on the case of *Emery v. Toledo* (1929), 121 Ohio St. 257 as partially quoted in the opinion and earlier cited and partially quoted in defendant Village's brief (Opinion, Appendix A1).

On August 17, 1976, plaintiffs-appellants filed their Notice of Appeal in the Ashland County Court of Common Pleas under Case No. 31073, Court of Appeals No. CA 644 in the Fifth Appellate District and on Sept. 7, 1976, plaintiffs-appellants filed their brief therein. Case No. CA 644 was subsequently renumbered Case No. CA 652 upon defendant's motion to dismiss Case No. CA 644 for failure to have a journal entry journalized at the time of Appeal.

Plaintiffs-appellants' Case No. 652 assigns as error:

1. That the Court erred in sustaining the defendant Village's Motion to Dismiss on the basis that, "(1) The Court lacks jurisdiction to hear the matters contained in paragraphs 1-15, because these are matters which have been the subject of litigation in Case No. 59190 in this court, which was appealed to and ruled upon in the District Court of Appeals Ninth Judicial District, and which was

further appealed to and ruled upon by the Ohio Supreme Court, and that all the issues raised in paragraphs 1-15 were or could have been litigated in that case;" (Motion of the Village of LaGrange filed in response to plaintiffs' Complaint), and upon the grounds, "(1) that the Court does not have jurisdiction of the subject matter because the matters raised are res judicata. . . ."

2. The Court erred in sustaining defendant Village's Motion to Dismiss paragraph 16 of plaintiffs' Complaint alleging the quarry is no longer a sufficient use in quality or quantity for the growing needs of the Village and they have access to a better supply from the Rural Lorain County Water Authority; upon the grounds, "(2) The matter contained in paragraph 16 of the plaintiffs' Complaint does not state a claim upon which relief can be granted."

3. The Court erred in finding that the petition in the original action must be attacked on the grounds that a court may have general jurisdiction over the subject of the action, but the allegations of the petition may be insufficient to confer jurisdiction of the subject of the action upon the case of *Hammond v. Richards*, 13 Ohio Op. 2d 30.

In Case No. CA 652 which was argued before the Fifth Appellate District, Ashland County, Ohio, on Jan. 20, 1977, and a judgment entry was filed in that case on Feb. 7, 1977 stating in a per curiam opinion finding that the appellants' claim that Ohio Civil Rule 8 provides that res judicata is an affirmative defense and is not available on a motion to dismiss is not well taken because it is apparent from the four corners of the complaint itself that this complaint is an attempt to reopen years later

an appropriation or eminent domain proceeding which has been closed for years.

With respect to the sixteenth paragraph of the Complaint, the Appellate Court found that it does not state a cause of action upon which any relief can be granted.

The Court therefore found all the assigned errors are overruled and the judgment of the Ashland County Court of Common Pleas is affirmed (Court of Appeals Opinion and Journal Entry, Appendix A8 and A9).

Upon these grounds this case was appealed to the Supreme Court of Ohio, and upon a finding of no substantial constitutional questions involved, the case is appealed to the Supreme Court of the United States from the judgment of the Court of Appeals (Supreme Court dismissal, Appendix A10).

REASONS FOR GRANTING THE WRIT

The petitioners' basic and fundamental constitutional rights have been violated, both substantively and procedurally.

The allegations of plaintiffs' complaint of gross and repeated violations of statutory mandates in eminent domain proceedings in Ohio stand unrefuted. The defendant's motion to dismiss on the basis of *res judicata*, supported by the Common Pleas Court of Ashland County, Ohio, and which decision was sustained by the Fifth Appellate District of Ohio must affirmatively show facts upon which the finding of *res judicata*, is to be sustained. Nowhere in the record of the Fifth Appellate District record before this Court does it show that the issues presented by the petitioners' complaint in the courts below were heard and decided. This Court long ago sustained

a direct appeal on the basis of Fifth Amendment due process considerations when a circuit court gave effect as *res judicata* to the judgment of a State court without a judicial finding of the vital fact which could justify deprivation of property of the parties under the forms of law alleged to be unlawful. *Fayerweather v. Ritch* (1904), 195 U.S. 276, 25 S. Ct. 58, 49 L. Ed. 193.

CORPUS JURIS SECUNDUM describes the elements of *res judicata* at 50 C.J.S. Sec. 598, *Judgments*, as follows:

> "The elements essential to the envoking of the doctrine of res judicata as a bar to an action have been variously stated, sometimes in the same jurisdiction, as identity of parties, of subject matter, and of cause of actions; the same parties, cause of action, and thing to be recovered; . . . ."

and at 50 C.J.S. Sec. 626, *Judgments*, it is stated:

> "A judgment in a suit will operate as a bar to a subsequent suit on the same cause of action, if, and only if, the judgment and the proceedings leading up thereto envolved, or afforded full legal opportunity for, an investigation and determination of the merits of the suit"

In considering a motion to dismiss, every properly pleaded allegation of fact must be taken as true. *Polk v. Glover* (1938), 305 U.S. 5, 59 S. Ct. 15, 83 L. Ed. 6; *Goosby v. Osser*, 409 U.S. 512, 93 S. Ct. 854, 35 L. Ed. 2d 36.

The allegations of petitioners' complaint, *inter alia*, allege that statutory mandates therein set out have not been followed in eminent domain proceedings. In the case of *Mississippi & R. River Boom Co. v. Patterson* (1879), 98 U.S. 403, 25 L. Ed. 206 the question whether conditions to the exercise of eminent domain have been followed

was dealt with. There the court said that when the sovereign power attaches conditions to the exercise of the power of eminent domain, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance, and may be determined in the Federal Courts, if otherwise the case is one of Federal jurisdiction. The court in the *Boom* case also said that objections to subject matter jurisdiction are not waived because not made in the lower court.

Paragraph 13, of the plaintiffs' complaint says that the Court of Common Pleas of Lorain County fixing value in this appropriation matter was without jurisdiction to proceed in the finding of value when it had not been vested with subject matter jurisdiction due to defective legislative enactments of the Village of LaGrange.

The courts of common pleas of the State of Ohio sitting in eminent domain proceedings are courts of limited jurisdiction, and such jurisdiction must affirmatively appear upon their record. *Harbeck v. Toledo* (1860), 11 Ohio St. 219.

Nowhere in the records of any of the courts which have touched and concerned this eminent domain proceeding does it appear affirmatively upon the record that such court was clothed with subject matter jurisdiction to proceed to fix value of the property of petitioners. As was said in *Boom Co., supra,* objections to subject matter jurisdiction may be raised at any time in any court.

The decision of the Common Pleas Court of Ashland County, Ohio, relied upon the case of *Emery v. Toledo* (1929), 121 Ohio St. 257, to support its opinion upon dismissal of paragraphs 1 through 15 of petitioners' complaint. Yet in the *Emery* holding, the court recognized an exception to the rule of estoppel invoked there (estoppel by voluntary participation in judicial proceedings) and went on to say at pages 262 and 263 of its opinion, "The only exceptions to this rule of estoppel are where no cause of action is stated or the court has not jurisdiction over the subject matter of the action. . . ."

It is further submitted that the total holding of the *Emery* decision upon which the lower court relied, was dictum and the case was really decided upon headnote 4, when no motion for a new trial had been filed, to vest the Supreme Court of Ohio with jurisdiction to review the evidence below.

Paragraph 15 of the petitioners' complaint alleged the appropriation of private property for private use in granting permission to the LaGrange Hunting and Fishing Club for use of the Village Quarry property for hunting and fishing purposes. The case of *Mills v. St. Clair County* (1850), 49 U.S. 569, 8 How. 569, 12 L. Ed. 1201, is an early case dealing with the subject of taking of private property for private use. There the court held that private property taken in eminent domain proceedings to be leased out to private occupants was an abuse of the power of eminent domain and may be redressed by an action at law like any other illegal trespass done under an assumed authority. In a somewhat analogous situation, Justice Hughes, in the case of *The City of Cincinnati v. Vester* (Ohio 1930), 281 U.S. 439, 50 S. Ct. 360, 74 L. Ed. 950, that the power conferred upon a municipality to take private property for public use must be strictly followed and excess condemnation of property for resale to recoup expenses could not be allowed.

The final paragraph 16 of petitioners' complaint alleges that the use taken in eminent domain of the quarry for water purposes is no longer sufficient in quality or quantity, and that the Village has access to a better sup-

ply from the Rural Lorain County Water Authority. The motion to dismiss for failure to state a claim was sustained by the courts below and no further leave to plead was given petitioners. The rules of pleading in Ohio practice have been almost identically adopted from the Federal Rules of Civil Procedure. These rules are set out in the Appendix at A18-A20.

Under the Federal practice truthfulness of the allegations of a complaint must be assumed as true where a limited evidentiary hearing was had without findings of fact and conclusions of law. *Kugler v. Helfant,* 421 U.S. 117, 95 S. Ct. 1524, 44 L. Ed. 2d 15.

Furthermore, when it appears that a complaint can be made good by amendment, the appellate court has the power to remand with leave to amend. *Goodman v. Niblack,* 102 U.S. 556, 26 L. Ed. 229.

And it is recognized that the lower court may after remand allow an amendment to an allegation as to the necessity for condemnation of land. *United States v. Gettysburg Electric R.R. Co.,* 160 U.S. 668, 16 S. Ct. 427, 40 L. Ed. 576.

Ohio, under its enactment of its Civil Practice Rules analogous to the Federal Rules of Civil Procedure, closely follows the Federal Rules.

In addition, where a complaint contains allegations sufficiently to make a case of alleged violation of constitutional rights the entire case may be brought to the Federal Supreme Court by the appeal. *Barber v. Asphalt Paving Co.,* 194 U.S. 618, 24 S. Ct. 784, 48 L. Ed. 1142.

CONCLUSION

Based upon the reasons and authorities set forth above, it is urged that this Court grant the petitioners' Writ of Certiorari.

Respectfully submitted,

JOHN R. JAMES
55 Shiawassee Avenue
Akron, Ohio 44313
Phone No. (216) 867-6161
Attorney for Petitioners

APPENDIX

OPINION OF THE COURT OF COMMON PLEAS

(Filed July 22, 1976)

Case No. 31073

IN THE COURT OF COMMON PLEAS
ASHLAND COUNTY, OHIO

FRED H. SMITH
and
DOROTHY A. SMITH
Plaintiffs
v.
VILLAGE OF LAGRANGE, A MUNICIPAL CORPORATION UNDER THE LAWS OF OHIO
Defendant.

OPINION

This cause came into this Court on a motion for change of venue heretofore filed by the Plaintiffs herein in the Court of Common Pleas, Lorain County, Ohio, Case #80044-75, said motion having been granted for good cause shown and ordered transferred to this county on May 3, 1976.

To the complaint filed herein, the Defendant village filed a motion for an order dismissing the complaint for the reasons that:

"1) the Court lacks jurisdiction to hear the matters contained in paragraphs 1 through 15 because these are matters which have been the subject of

litigation in Case No. 59190 in this Court, which was appealed to and ruled upon by the District Court of Appeals for the 9th Judicial District, and which was further appealed to and ruled upon by the Ohio Supreme Court, and that all the issues raised in paragraphs 1 through 15 were or could have been litigated in that case;

2) the matter contained in paragraph 16 of the Plaintiffs' complaint does not state a claim upon which relief can be granted."

Said motion having been argued before this Court on June 4, 1976 and submitted to the Court.

The Court finds from the evidence, briefs, arguments of counsel, and the exhibits offered, that this action began in 1955 when the village filed a petition in Lorain County Common Pleas Court to appropriate property of the defendants and others, being Case No. 59190. The case was submitted to a jury which assessed the amount to be paid by the village to the owners of the property; both parties appealed the verdict and judgment. These appeals were dismissed by all the parties as a result of an agreement entered into by all parties on March 31, 1956. (See Defendant's Exhibit #2). All issues of the case being resolved in the Agreement, with the journal entry being filed and conveyance of the subject real estate made by the land owners to the village, said conveyance being recorded in Volume 661, page 120, Lorain County Deed Records. (See Plaintiffs' Exhibit #1).

Other litigation was instituted by the Plaintiffs pertaining to this real estate; cases being appealed to the Court of Appeals and to the Ohio Supreme Court; the judgment of the Common Pleas Court and the Agreement being sustained by these appellant [sic] courts.

The action at bar is a complaint seeking injunctive relief, damages, that title be returned to the original owners, and other relief, on the basic grounds that the village in their preliminary resolutions prior to taking action to appropriate the property were void actions and therefore the Common Pleas Court of Lorain County was without jurisdiction over the subject matter of the case to proceed in the original appropriation proceedings; that the Plaintiffs have been deprived of property without due process of law in violation of their constitutional rights.

The Court finds that the motion of the Defendant village is well taken.

A legal argument similar to that raised by the Plaintiffs herein was before the Supreme Court of Ohio in the case of *Emery v. City of Toledo,* 121 O.S. pg. 257. In that appropriation case a landowner had filed an answer and had submitted to the jurisdiction of the Court and to the trial of the cause without questioning of the sufficiency of the preliminary ordinances and resolutions until the landowner amended her petition in the Court of Appeals further alleging the city had not enacted proper and sufficient ordinances and resolutions to comply with the statutes in such cases made and provided as a preliminary to the prosecution of said appropriation proceedings.

The Court of Appeals found in favor of the city on these issues and the Supreme Court affirmed, stating:

"It has been consistently held by this court and the courts of other states that a party who voluntarily participates in judicial proceedings, which are adjudged adversely to him, will be held to have elected to abide by the judgment rendered, or, in other words, will be required to make timely objections. The only exceptions to this rule of estoppel are where no cause

of action is stated or the court has no jurisdiction over the subject matter of the action. Whatever importance might have attached to the alleged insufficiency of the municipal legislation, and whether or not those matters will affect the prosecution of the improvement, Mrs. Emery may not avail herself of them after speculating upon the results of the jury trial. If the verdict had been sufficiently large to satisfy her, it is fair to state that this alleged defect would not have been pleaded. It is a matter of which she had knowledge, or reasonable means of obtaining knowledge (being a matter of record), before the evidence of values was submitted to the jury. If one were permitted to take such an inconsistent position, parties would invariably first take chances with court or jury, and afterwards urge defenses previously known to them, thereby securing a second, or possibly numerous, trials, depending upon the number of objections available. Municipalities are permitted to appropriate private property to municipal uses by reason of authority conferred upon them by legislation. That authority depends upon the statutes pertinent thereto, and is limited thereby. When statutes prescribe the mode of procedure and the steps to be taken, the statutes must be followed with reasonable strictness. It does not follow that an alleged failure in this respect can be made ground of objection and urged in bar to appropriation proceedings after such proceedings have gone to verdict and judgement. We do not hold that those objections could not have been made in the appropriation suit before voluntarily submitting to the jurisdiction of the court and to the determination of a jury on the subject of values. That the objection could not have been made after verdict and judgement is in harmony with the following cases:

. . . (out of state cases cited) . . . The Court of Appeals did not err on the question of estoppel."

This Court further finds as a matter of law that the term "jurisdiction" as found in 14 O J 2d, paragraph 93, page 510, means "the power to hear and determine a cause", and that the test of jurisdiction is the Court's power to act at all, not the correctness of its decision in so acting; further, the Court having power to set in motion the machinery of law has jurisdiction over the subject matter.

Another principle of the law of a Court's jurisdiction is as follows: "a Court may have general jurisdiction over the subject of the action, but the allegations of the petition may be insufficient to confer jurisdiction of the subject of the action. (*Hammond v. Richards,* 13-OO-2d, p. 30 [13 Ohio Op. 2d p. 30].)

There is no evidence before this Court that the petition in the original action was ever attacked on such grounds. Therefore, it is the opinion of this Court that the complaint should be dismissed at costs to the Plaintiffs.

Counsel for the village will prepare a Journal Entry to conform to this Opinion.

/s/ A. Ross Siverling
Judge

July 22, 1976

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Filed October 20, 1976)

Case No. 31073

IN THE COURT OF COMMON PLEAS
ASHLAND COUNTY, OHIO

FRED H. SMITH,
DOROTHY A. SMITH,
Plaintiffs,

vs.

VILLAGE OF LAGRANGE, OHIO
A MUNICIPAL CORPORATION,
Defendant.

JOURNAL ENTRY

This cause came on for hearing by the Court of June 4, 1976, on the pleadings, evidence, arguments of counsel, briefs, and the Motion to Dismiss of the Defendant, and the Court finds:

1. That the subject matter of this action was begun in 1955 by the Village of LaGrange filing an action against these and other Defendants to appropriate real property, the subject of this action, in the Court of Common Pleas for Lorain County.

2. That the case was submitted to a jury which assessed the amount to be paid by the Village to the parties.

3. That at no time were the questions raised in this action raised before the Court in the appropriation action.

4. That both parties appealed the verdict.

5. That these appeals were dismissed by all parties upon all the issues being resolved by a written agreement signed by all parties, and the conveyance of property; all of which was incorporated in a Journal Entry disposing of the case in the Court of Common Pleas.

6. That thereafter appeals were instituted by the Plaintiffs herein to the Court of Appeals and the Supreme Court of Ohio, and the judgement of the Court of Common Pleas for Lorain County was sustained in all instances.

The Court finds, further, that the Motion to Dismiss filed by the Defendant, Village of LaGrange, Ohio, praying for dismissal of the instant action is well taken on the grounds that the matters raised in this action were not raised at the time of the hearing on the appropriation case; that if these issues were to be raised they should have been raised before the matter was submitted to that Court and jury; and that not having been raised at that time, the matter is res judicata, and cannot properly be considered by this Court in this action.

The Court further finds that it has jurisdiction over the parties and subject matter so as to support the decision in this case.

It is, therefore, ordered, adjudged, and decreed that the Complaint be dismissed at Plaintiffs' costs.

/s/ A. ROSS SIVERLING
Judge

Approved:

OPINION OF THE COURT OF APPEALS OF ASHLAND COUNTY

(Filed February 7, 1977)

Case No. CA-652

IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
ASHLAND COUNTY, OHIO

FRED H. SMITH AND DOROTHY A. SMITH,
Plaintiff-Appellants,

vs.

VILLAGE OF LAGRANGE,
A MUNICIPAL CORPORATION UNDER
THE LAWS OF OHIO,
Defendant-Appellee.

Per Curiam

This is an appeal from a judgment of the Ashland County Court of Common Pleas dismissing a claim on the grounds that all matters contained in the first fifteen paragraphs of the complaint are res judicata and that the sixteenth paragraph states no cause of action.

The appellant claims that O.C.R. 8 provides that res judicata is an affirmative defense and is not available on a motion to dismiss. We find that this claim is not well taken in this case because it is apparent from the four corners of the complaint itself that this complaint is an attempt to reopen years later an appropriation or eminent domain proceeding which has been closed for years.

With respect to the sixteenth paragraph of the complaint, we find that it does not state a cause of action upon which any relief can be granted.

Therefore, all assigned errors are overruled and the judgment of the Ashland County Court of Common Pleas is affirmed.

/s/ NORMAN J. PUTMAN
/s/ DAVID D. DOWD, JR.
/s/ LELAND RUTHERFORD
Judges

JUDGMENT ENTRY OF THE COURT OF APPEALS OF ASHLAND COUNTY

(Filed February 7, 1977)

Case No. CA-652

IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
ASHLAND COUNTY, OHIO

FRED H. SMITH and DOROTHY A. SMITH,
Plaintiff-Appellants,

vs.

VILLAGE OF LAGRANGE,
A MUNICIPAL CORPORATION UNDER
THE LAWS OF OHIO,
Defendant-Appellee.

For the reasons stated in the Per Curiam Opinion on file, all assigned errors are overruled and the judgment of the Ashland County Court of Common Pleas is affirmed.

/s/ NORMAN J. PUTMAN
/s/ DAVID D. DOWD, JR.
/s/ LELAND RUTHERFORD
Judges

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL

(Dated May 12, 1977)

No. 77-327

THE SUPREME COURT OF OHIO
THE STATE OF OHIO,
CITY OF COLUMBUS.

FRED SMITH *et al.*,
Appellants,
vs.
VILLAGE OF LAGRANGE,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR ASHLAND COUNTY

This cause, here on appeal as of right from the Court of Appeals for Ashland County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

CONSTITUTION OF THE UNITED STATES

Amendment [V]

[Rights of Persons]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [XIV]

[Rights of Citizens]

§ 1. [1] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall [2] make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State [3] deprive any person of life, liberty, or property, without due process of law; nor [4] deny to any person within its jurisdiction the equal protection of the laws.

AMENDED HOUSE BILL NO. 440

AN ACT

To enact section 121.22 of the Revised Code relative to meetings of state boards and commissions being open to the public.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 121.22 of the Revised Code be enacted to read as follows:

Meetings of state boards and commissions open to public.

SEC. 121.22. All meetings of any board or commission of any state agency or authority are declared to be public meetings open to the public at all times. No resolu-

tion, rule, regulation or formal action of any kind shall be adopted at any executive session of any board or commission of any state agency or authority.

The minutes of a regular or special session or meeting of any board or commission of any state agency or authority shall be promptly recorded and such records shall be open to public inspection.

The provisions of this act shall not apply to the pardon and parole commission when its hearings are conducted at a penal institution for the sole purpose of interviewing inmates to determine parole or pardon.

Effective.

SECTION 2. This act shall take effect January 31, 1954.

WILLIAM SAXBE,
Speaker of the House of Representatives.

JOHN W. BROWN,
President of the Senate.

Passed July 6, 1953.

Approved July 20, 1953

FRANK J. LAUSCHE,
Governor.

The section number designated herein is in conformity to the plan and numbering of the Revised Code.

WILLARD D. CAMPBELL,
Director of Code Revision.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 22nd day of July, A. D. 1953.

TED W. BROWN,
Secretary of State.

File No. 241 Effective January 31, 1954.

OHIO REVISED CODE

§ 719.04 Resolution declaring intent to appropriate. (GC § 3679)

The legislative authority of a municipal corporation shall, whenever it is deemed necessary to appropriate property, pass a resolution declaring such intent, defining the purpose of the appropriation, and setting forth a pertinent description of the land and the estate or interest therein desired to be appropriated.

History: GC § 3679; Bates RS § 1536-105; 96 v 27, § 12; 98 v 164, § 12; 99 v 208, § 12. Eff 10-1-53. Analogous to RS §§ 2234, 2235.

§ 719.05 Proceedings on passage of appropriation resolution. (GC § 3680)

The mayor of a municipal corporation shall, immediately upon the passage of a resolution under section 719.04 of the Revised Code, declaring an intent to appropriate property, for which but one reading is necessary, cause written notice to be given to the owner of, person in possession of, or person having an interest of record in, every piece of property sought to be appropriated, or to his authorized agent. Such notice shall be served by a person designated for the purpose and return made in the manner provided for the service and return of summons in civil actions. If such owner, person, or agent cannot be found, notice shall be given by publication once a week for three consecutive weeks in a newspaper of general circulation in the municipal corporation, and the legislative authority may thereupon pass an ordinance by a two-thirds vote of all members elected thereto, directing such appropriation to proceed.

History: GC § 3680; Bates RS § 1536-105; 96 v 27, § 12; 98 v 164, § 12; 99 v 208, § 12. Eff 10-1-53. Analogous to RS §§ 2234, 2235, 2263.

§ 719.21 Neglect to pay or take possession in six months; attorney's fees. (GC § 3697)

When a municipal corporation makes an appropriation of property, and fails to pay for or take possession of such property within six months after the assessment of compensation is made, its right to make such appropriation on the terms of the assessment so made shall cease, and lands so appropriated shall be relieved from all encumbrance on account of any of the proceedings in such case, and the judgment or order of the court directing such assessment to be paid shall be void, except as to the costs adjudged against the municipal corporation. Upon the motion of any defendant, such costs may be retaxed, and a reasonable attorney's fee paid to the attorney of such defendant, which, together with any other proper expenses incurred by the defendant, may be included in the costs.

History: GC § 3697; RS Bates § 1536-115; 96 v 30, § 22. Eff 10-1-53. Analogous to RS § 2260.

§ 731.10 President pro tempore of the legislative authority; employees. (GC § 4216)

At the first meeting in January of each year, the legislative authority of a village shall immediately proceed to elect a president pro tempore from its own number, who shall serve until the first meeting in January next after his election. The legislative authority may provide such employees for the village as it determines, and such employees may be removed at any regular meeting by a majority of the members elected to such legislative authority.

When the mayor is absent from the village or is unable, for any cause, to perform his duties, the president pro tempore shall be the acting mayor, and shall have the same powers and perform the same duties as the mayor.

History: GC § 4216; RS Bates §1536-849; 96 v 82, § 195; 99 v 246, § 195. Eff 10-1-53.

[ORDINANCES AND RESOLUTIONS]

§ 731.17 Adoption of ordinances and resolutions. (GC § 4224)

The action of the legislative authority of a municipal corporation shall be by ordinance or resolution, and on the passage of each ordinance or resolution the vote shall be taken by yeas and nays and entered upon the journal, but this shall not apply to the ordering of an election, or direction by the legislative authority to any board or officer to furnish the legislative authority with information as to the affairs of any department or office. No bylaw, ordinance, or resolution, of a general or permanent nature, or granting a franchise, or creating a right, or involving the expenditure of money, or the levying of a tax, or for the purchase, lease, sale, or transfer of property, shall be passed, unless it has been fully and distinctly read on three different days, and with respect to any such bylaw, ordinance, or resolution, there shall be no authority to dispense with this rule, except by a three-fourth[s] vote of all members elected to the legislative authority, taken by yeas and nays, on each bylaw, resolution, or ordinance, and entered on the journal. No ordinance shall be passed without the concurrence of a majority of all members elected to the legislative authority.

History: GC § 4224; RS § 1694; Bates §§ 1536-617, 1536-620, 1536-850; S&C 1521; 66 v 166, §§ 98, 99; 87 v 36; 90 v 136; 96 v 60, § 122; 96 v 82, § 196. Eff 10-1-53. Analogous to RS §§ 1536-3, 1545-91, 1655b, 1665, 1693, 1694 and 1694a.

[PETITION]

§ 2309.04 Content of petition. (GC § 11305)

The first pleading shall be the petition by the plaintiff, which must contain:

(A) A statement of facts constituting a cause of action in ordinary and concise language;

(B) A demand for the relief to which the plaintiff claims to be entitled. If the recovery of money is demanded, the amount shall be stated; and if interest is claimed, the time for which interest is to be computed shall be stated.

History: GC § 11305; RS § 5057; Revised Statutes of 1880, § 5060; 51 v 57, § 85; 94 v 279, § 5057. Eff 10-1-53.

OHIO RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading

* * * * *

(E) Pleading to be concise and direct; consistency

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

Rule 12. Defenses and Objections—When and How Presented—by Pleading or Motion—Motion for Judgment on the Pleadings

* * * * *

(B) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

Rule 18. Joinder of Claims and Remedies

(A) Joinder of claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

(B) Joinder of remedies; fraudulent conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading

* * * * *

(e) Pleading to be concise and direct; consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

Rule 12. Defenses and Objections—When and How Presented—by Pleading or Motion—Motion for Judgment on Pleadings.

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted

in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. (As amended Feb. 26, 1966, effective July 1, 1966.)

Rule 18. Joinder of Claims and Remedies.

(a) Joinder of claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party. (As amended Feb. 28, 1966, effective July 1, 1966.)

(b) Joinder of remedies; fraudulent conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two

claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.